MOTION FILED SEP 25 1956

IN THE

Supreme Court of the United States

October Term, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

Motion of Credit Managers Association of Southern California for Leave to File Brief as Amicus Curiae and Brief.

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Petitioners,

vs.

KAL W. LINES,

Respondent.

Motion of Credit Managers Association of Southern California for Leave to File Brief as Amicus Curiae.

The Credit Managers Association of Southern California respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.*

The consent of the Petitioners herein has been obtained but the Respondent herein refuses to consent to the filing of a brief by the Credit Managers Association of Southern California as *amicus curiae.*

Interest of Within Petitioner.

The Credit Managers Association of Southern California is vitally interested in the within proceeding.

The Credit Managers Association of Southern California is a non-profit organization consisting of approximately sixteen hundred wholesalers, distributors, banks and creditor interests in Southern California with its headquarters at Los Angeles. It is affiliated with the National Association of Credit Men.

For more than fifty-five years the Credit Managers Association of Southern California (and its predecessor in name, the Los Angeles Wholesalers Board of Trade) has been vitally interested in serving creditors in its area.

It and its companion non-profit creditor organizations have received the recognition and commendation of the bankruptcy court in this area upon numerous occasions for its said services.

The United States Court of Appeals for the Ninth Circuit (*In re Christ's Church of the Golden Rule*, 165 F. 2d 1007) reversed the Order of the Referee and the affirming Order of the District Judge. The Referee had determined that the attorneys proposed to be employed by the trustee had an adverse interest because the manager of the bankrupt had advised creditors to place their claims in the hands of the Los Angeles Board of Trade, thus bringing about the contended disqualification of said attorneys to act as attorneys for the trustee. In reversing the Referee and the District Judge, the opinion at page 1009 refers to the Association as *"a body long serving creditors in insolvencies and bankruptcy proceedings."* (Emphasis ours.)

In recognizing the rights of creditors in non-statutory or common law Assignment for Benefit of Creditors, one of the principal functions of the Association, the Supreme Court of the State of California said, in *Brainard v. Fitzgerald*, 3 Cal. 2d 157, at page 163:

> "we are not inclined to interfere with the practice developed by local boards of trade of procuring assignments, executed in good faith, for the benefit of creditors generally. Experience has shown that this practice has much to commend it."

The Credit Managers Association of Southern California now is and always has been vitally interested in bringing about the participation of individual creditors in bankruptcy and insolvency proceedings. In connection with these debtor-creditor matters with which it concerns itself it encourages the creditors to attend the court examinations, to serve upon the Committees of Creditors, to report matters of violations or fraud on behalf of the bankrupt, to the bankruptcy court, etc. It also encourages creditors to cooperate with the bankruptcy administration in blocking the discharge of the dishonest bankrupt.

However, the first order of importance in this creditor participation is the assertion of the right granted by Congress to creditors to bring about the selection and election of the creditors' designated trustee.

Relevant Facts and Questions of Law Which Petitioner Believes Have Not Been Fully Presented.

The question here presented between a group of creditors and the individual who has been declared elected trustee is of vital importance to all creditor organizations. One of the principal functions of the association is the service rendered its members through organization of its

members in bankruptcy proceedings. The present decision could have far reaching effects in the creditor world.

One or two creditors, prompted by an opportunist, job seeking, claim soliciting individual, seeking to have himself elected as trustee, could have the claims of all of the other creditors disqualified and disenfranchised merely by a showing (as here) that they belonged to a creditor organization.

The Petition of present Petitioners filed with the Court does not adequately set forth the basic question as pertains to Credit Associations and likewise does not set forth the conflict between the decision and prior decisions of the same and other courts of equal jurisdiction and likewise does not give consideration to the 1938 Amendment to Sections 2a (21 and 70a (8)) which give complete jurisdiction to the bankruptcy court over Assignees and Assignments for the Benefit of Creditors which are voided by the filing of bankruptcy within four months.

It is respectfully submitted that neither the facts nor the law have been adequately presented to this Honorable Court upon this subject of the creditor "disqualification by Association" and the Petitioner here sincerely believes that the matters set forth in its accompanying brief bears a direct and necessary relevancy to the case.

THOMAS S. TOBIN,

Attorney for Credit Managers Association of Southern California.

IN THE

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FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

Brief of Credit Managers Association of Southern California as Amicus Curiae.

Interest of Amicus Curiae.

The Credit Managers Association of Southern California is an affiliate of the National Association of Credit Men and is a nonprofit organization, the members of which comprise over sixteen hundred of the principal suppliers, wholesalers, distributing concerns, banks and other commercial institutions in Southern California. Its opera-

tions and activities are directed by its Board of Directors selected from its membership.

One of the most important services and functions of the Credit Managers' Association of Southern California is rendered in connection with the bankruptcy proceedings in which its members are involved. In bankruptcy proceedings in Southern California, when it finds a number of its members involved as creditors in any particular case, the Association notifies the creditors of the pending bankruptcy proceeding; that members of the Association are involved, and requests that their claims in the bankruptcy be filed along with those of the members of the said Association. The claims so received and so filed are voted in the interests of creditors, for a trustee, for a Creditors' Committee, for the approval or rejection of a Plan of Arrangement under Chapter XI or Plan of Reorganization under Chapter X, or in any other proceeding or matter wherein the creditors have the right of control through their collective action.

The Credit Managers' Association of Southern California has played a vital part in bankruptcy administration in this area. It has been constantly diligent in its efforts to improve bankruptcy administration, to safeguard the rights of creditors and bring about the prosecution of dishonest and fraudulent bankrupts.

It and its companion nonprofit creditor organizations have received the recognition and commendation of the bankruptcy court in this area upon numerous occasions for its said services.

The Credit Managers Association of Southern California now is and always has been vitally interested in bringing about the participation of individual creditors in bankruptcy and insolvency proceedings. In connection with these debtor-creditor matters with which it concerns itself, it encourages the creditors to attend the court examinations, serve upon the Committees of Creditors, report matters of violations of the Bankruptcy Act or fraud on behalf of the bankrupt to the bankruptcy court, etc. It also encourages creditors to cooperate with the bankruptcy administration in blocking the discharge of the dishonest bankrupt.

The first order of importance in this creditor participation is the assertion of the right granted by Congress to creditors to bring about the selection and election of their own designated trustee.

Statute Involved.

The right of creditors to elect their trustee in bankruptcy; Bankruptcy Act, Section 44a (11 U. S. C. A. Sec. 72a) provides:

> "a. The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of a trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee appointed fails to qualify as herein provided, the court shall make the appointment."

The jurisdiction of the bankruptcy court (referee) in connection therewith:

Bankruptcy Act, Section 2(17) (11 U. S. C. A. Sec. 11(17)) provides that the courts of bankruptcy shall have jurisdiction to:

> "(17) approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;"

Question Presented.

CAN MEMBERSHIP BY CREDITORS IN MUTUAL CREDITOR'S ORGANIZATION PER SE AND WITHOUT SHOWING OF FRAUD, OPPRESSION OR UNFAIR DEALING OF ANY KIND, DISQUALIFY SUCH MEMBERS IN VOTING FOR A TRUSTEE IN BANKRUPTCY PROCEEDINGS?

The basic policy of the National Bankruptcy Act provides for creditor control and the question presented is whether a large segment of creditors can be prevented from participating in such creditor control, merely because they are members of a credit organization, without any showing of fraud, oppression or unfair dealings of any kind on their part and without showing that the trustee of their choice is either disqualified under the provisions of Section 44 and/or will not administer the bankrupt estate fairly and impartially.

Determination of Referee—of the United States District Judge—of the United States Court of Appeals for the Ninth Circuit.

The Referee in the instant bankruptcy proceeding rejected the election by the majority of creditors voting, although it was admitted that the rejected trustee would administer the estate "impartially, fairly and accurately."

Upon review the United States District Judge (130 Fed. Supp. 312) reversed the Referee's Order. The Judge carefully reviewed the action of the Referee. He stated, far better than we can, what we believe to be the lack of legal support for the creditor disqualification (p. 315):

> "Petitioners are not within any of the classes of creditors that are excluded by Section 72 from taking part in the selection of a trustee. In view of this fact, and in view of the fact that petitioners' nominee for trustee is conceded to be competent, fair and impartial, there must be the most compelling reasons for disenfranchising the great majority of the creditors in favor of a small minority of them. The reason given by the referee is that petitioners' votes represented an attempt by petitioners to retain *'some sort of control'* over the bankrupt estate for the benefit of the Board of Trade. . . .
>
> "From these facts the referee attempts to torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditor is under no such alleged disability except through the creditors who propose him. . . ."

The Judge then reflects the fears of the organized creditor world and points out:

> "Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of the trustee by creditors. Any creditor for whose benefit an assignment had been made before bankruptcy would be automatically disqualified. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors.
>
> "No exact precedent has been cited for the action here taken by the referee."

Upon appeal to the United States Court of Appeals for the Ninth Circuit, the Order of the United States District Judge was reversed and the Order of the Referee affirmed. *Kal W. Lines, Appellant v. Falstaff Brewing Co., et al., Appellees,* 233 F. 2d 927, and on page 933 under the title heading:

> "7. Since 'Reasonable Men Could Differ as to the Propriety of the Action Taken' by the Referee, It Cannot Be Said That He Abused His Discretion."

said in part:

> "that the Referee found *as a fact* that it was the Committee's intention 'indirectly to keep, if possible, some sort of control' over the bankrupt's assets":

This is a most serious charge, if supportable. Such interference with bankruptcy administration, if shown *in any manner to be actual as opposed to fancied,* would be most reprehensible to all those who have the welfare

of bankruptcy and its honest and efficient administration at heart.

Do the referee and the Appellate Court imply that this well known and long standing credit organization, as the holder of funds received under an Assignment for Benefit of Creditors (for all creditors—not only its members) was "about to" defy the Bankruptcy Act and the court and "about to" refuse to comply with the mandatory provision of Section 70a(8) or Section 2a(21)? Charges of this tenor should not be by shadowy suggestion. And, especially so when they are used by the referee as the sole ground in support of his discretion which he exercised in the disenfranchisement of creditors' rights.

Upon being confronted by this perplexing charge, most certainly a secondary inquiry should be made. Wherein does the record support the referee's finding that it was the Committee's intention "indirectly to keep, if possible, some sort of control over the bankruptcy assets"? Did the referee at that time have any knowledge, not reflected by the record, that there was an attempt "about to be made" or "threatened"?

Was the referee fearful that his jurisdiction and power under Section 2a(21) and Section 70a(8) was about to be challenged by this Committee of Creditors or the creditor organization? The record does not appear to contain any support for such apprehension.

Upon bankruptcy the assignee must account to the bankruptcy court, which has sole jurisdiction, not only as to property in the assignee's possession, but also of his fee and likewise it can approve or disapprove every disbursement made by him. After the amendment of 1938, where an Assignment for the Benefit of Creditors

was voided by bankruptcy, the status of the assignee (whether statutory or nonstatutory) was almost identical with that of a receiver appointed by the bankruptcy court. Their compensation was fixed by the bankruptcy court and they both account to the bankruptcy court, which has sole jurisdiction to approve their respective accounts. Having in mind that the referee was vested with this power and exclusive jurisdiction, what were those fears of the referee?

The charge is of such serious import that it should be supported by at least some evidence. Had there been any intimation that the Board of Trade of San Francisco or the assignee had defied the power or authority of the bankruptcy court or had refused to turn over assets or to account to the bankruptcy court, then we would have something upon which the referee could have firmly based such a fear as he expressed.

There is nothing whatsoever in the record to support the fear of the referee that such acts of control were imminent.

The United States District Judge in his written opinion referred to hereinabove aptly expressed the point we are endeavoring to make here, to wit:

> "The Referee attempts to torture some adverse or conflicting interest or prejudicial association which would disenfranchise."

The district judge correctly points out that: "The mere fact that these same creditors were members of a trade association should not, without more, operate to disqualify the voices of a great majority of creditors."

Disqualification of Trustee Proposed by Creditor Must Be for Substantial Reasons, for Just Cause and Not by Unsupported Inferences.

The petitioners have cited the principal reported cases on this particular point and we will not quote therefrom other than to call particular attention to the following cases:

In the Second Circuit:

In re Mayflower Hat Co., 65 F. 2d 330;

Hale Desk Co., 89 F. 2d 1;

In re Bronx Ice Cream Co., Inc., 66 F. 2d 620;

In re Paramount Publix Corporation, 68 F. 2d 703.

In the Fourth Circuit:

Beale v. Snead, 81 F. 2d 970.

Assignment for Benefit of Creditors.

Prior to the amendment to Section 2a(21) and Section 70a(8) giving jurisdiction of the Bankruptcy Court over assignees holding property under Assignments for Benefit of Creditors, where bankruptcy follows within four months, there might have been a basic justifiable fear or suspicion that an assignee might prove to be a person who might have adverse interests to the bankrupt estate. However, since the amendment, his status is almost the same as a receiver appointed in the bankruptcy proceeding. He must account fully and his fee is allowed by the bankruptcy court. His interest is no more adverse than that of the bankruptcy receiver. The creditors did not vote for the assignee as trustee, but there should be no legal impediment in his being elected trustee in the same manner as the receiver can be elected trustee. In fact, as a matter of efficiency and economy, experience

has shown that the assignee is the most logical trustee to continue and conclude the liquidation and administration of the bankrupt estate under the orders of the referee.

We make the above observations in an attempt to demonstrate that the Assignee for the Benefit of Creditors is not one, "*per se*," adverse to the bankruptcy estate and is not and should not be disqualified to act as the trustee of a bankruptcy estate if he is elected and not otherwise disqualified. The petition of the original petitioners filed with the court herein does not give adequate consideration to the change in the status of an Assignee for the Benefit of Creditors in subsequent bankruptcy proceedings which are voided by the filing of bankruptcy within four months.

Conflict in Decisions of Circuits.

The decision in this case establishes a precedent in its determination that claims solicited by or through a credit trade association cannot be voted for an impartial trustee.

In the decision of the United States Court of Appeals for the Tenth Circuit of *Garrison v. Pilliod Cabinet Co., et al.*, 50 F. 2d 1035, the charge was made that a credit trade association of which the assignee was manager could not solicit claims under General Order 39, which in terms prohibits a receiver or his attorney from soliciting proofs of debt, etc. The court there said at page 1036:

> "An objection was made to the voting of the twenty-six claims on the ground that they had been solicited by Garrison while assignee, in violation of general order 39 (11 U. S. C. A. Section 53), which in terms prohibits a receiver or his attorney from soliciting 'any proof of debt, power of attorney, or other authority to act for, or represent any creditor for any purpose. . . .' The objection was sustained.

"The District Court affirmed that decision, holding both that the restrictions of the general order applied and that Garrison was not a proper person to act as trustee because of the prior assignment.

"Counsel for appellant insists that the general order has no application and should not be extended to assignees. We agree that it is inapplicable. It is suggested that a like reason exists for applying the restriction to assignees. But the rule, expressed in plain language, cannot be extended to parties not actually named. There is no room for interpretation beyond its terms. . . ."

The assignee was rejected as trustee, but for other reasons. In the instant case now before the court, the trustee, whom the majority of creditors sought to elect, was not the assignee and was admittedly *competent, fair and impartial.*

The important points here are that (1) the solicitation by the trade association is not improper or prohibited and (2) its nominee for trustee should be approved unless an inquiry *"into other considerations affecting the fitness of the applicant"* shows him to be disqualified.

It is significant that this later decision was rendered June 15, 1931, and prior to the amendment of 1938 when Assignments for Benefit of Creditors within four months of bankruptcy, and the assignee were placed upon the same foundation as receivers in bankruptcy with full power and jurisdiction in the bankruptcy court to require property to be turned over, approve accounts, fix fees, etc.

The case of *Garrison v. Pilliod Cabinet Co.* is quoted with approval in the case of *Rinderknecht v. Toledo Association of Credit Men*, 13 Fed. Supp. 555, D. C. N. D. Ohio (U. S. District Judge Killits) and in reference to

the service rendered by creditor organizations said, at page 557:

> "The usefulness of such an institution functioning honestly in promoting the threefold object of the law just referred to is obvious to any District Judge of much experience. . . .
>
> "Any agency which may serve to stiffen a critical attitude in creditors, individually or collectively, and to encourage an effort to aid the referee or court to reach the result which the law contemplates, deserves sympathetic consideration. We think that a presumption is justifiable that such an association, with nationwide co-operating connections, will function reasonably and with a fair degree of disinterestedness. . . ."

It is respectfully submitted that neither the facts or the law have been adequately presented to this Honorable Court upon this subject of "disqualification by association" and the petitioner here sincerely believes that the matters as set forth in the within brief bear a direct and necessary relevancy to the case.

THOMAS S. TOBIN,

Attorney for Credit Managers Association of Southern California.

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JOHN T. FEY, C

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Petitioners.

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA TO FILE BRIEF AS AMICUS CURIAE.

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Petitioners,

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA TO FILE BRIEF AS AMICUS CURIAE.

Respondent Kal W. Lines objects to the motion for leave to file brief as *amicus curiae*, and withheld con-

sent to the filing thereof, for the following and each of the following reasons:

1. THE PETITION FOR CERTIORARI DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW.

The decision of the Court of Appeals is to the effect that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence, and that *under the facts and circumstances of the particular case* the referee exercised a sound discretion in doing so. The decision was confined and will be confined to the factual setup of the particular case, and it poses no important question of law requiring settlement by this Court.

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2. THE PETITION FOR CERTIORARI DOES NOT INVOLVE A CONFLICT OF DECISION.

A plain reading of the case of *Garrison v. Pilliod Cabinet Co.*, 50 F. 2d 1035, upon which the amicus curiae brief as well as the petition for certiorari relies as basis for a contention that conflict of decision exists, brings the ready conviction that the cited case is in harmony rather than in conflict with the decision herein.

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3. THE PETITION FOR CERTIORARI DOES NOT INVOLVE A DECISION THAT IS INCORRECT.

The decision of the Court of Appeals is its own best advocate. It is sound in law and sound in fact and no occasion exists for disturbing it.

4. THE PROPOSED BRIEF OF AMICUS CURIAE DOES NOT SHOW INADEQUACY OF PRESENTATION BY THE PETITIONERS.

The proposed amicus curiae brief is merely a restatement of the petition. It relies upon the same cases, but adds and stresses *In re Christ's Church of the Golden Rule*, 9 Cir. 1948, 165 F. 2d 1007, which involved selection of special attorneys by a trustee and not the election of a trustee. It demonstrates what respondent sensed when consent to file the brief was withheld, namely, that other Boards of Trade or Credit Associations are eager to add their weight to petitions for certiorari sponsored by one of their number, even though, as here, there is no inadequacy of presentation by the petitioners.

Wherefore, respondent respectfully submits that the motion of Credit Managers Association of Southern California for leave to file brief as amicus curiae should be denied.

Dated, San Francisco, California,
October 4, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.

SEP 24 1956

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Petitioners,

vs.

KAL W. LINES,

Respondent.

MOTION OF ROCKY MOUNTAIN ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

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